Nos. 18-3695 & 19-1157

In the United States Court of Appeals
For the Eighth Circuit

DOLGENCORP, LLC
Petitioner–Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent–Cross-Petitioner.

On Cross-Petitions for Review and Enforcement of
National Labor Relations Board Case No. 14-CA-223328

REPLY BRIEF OF PETITIONER–CROSS-RESPONDENT

MORGAN, LEWIS & BOCKIUS LLP
Lauren M. Emery
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-5203
Admitted in Illinois only; Practice supervised by DC Bar members

MORGAN, LEWIS & BOCKIUS LLP
Joseph C. Ragaglia
Michael E. Lignowski
Crystal S. Carey
1701 Market Street
Philadelphia, PA 19103
(215) 963-5365

Counsel of Petitioner–Cross-Respondent, Dolgencorp, LLC

CORPORATE DISCLOSURE STATEMENT

Dolgencorp, LLC is a limited liability company organized under the law of the State of Kentucky. It is a wholly owned subsidiary of Dollar General Corporation. Dolgencorp, LLC does business under the name "Dollar General."

Dollar General Corporation is a publicly held corporation organized under the laws of the State of Tennessee. No parent corporation or publicly held corporation owns more than 10% of the stock of Dollar General Corporation.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

ARGUMENT IN REPLY

The union election at issue in this appeal involved several unusual circumstances: (1) an extremely small bargaining unit, comprising only six employees; (2) a narrow 4-2 vote, in which a single change in vote would have altered the result; and (3) an unusually short time—24 days—between the signing of the cards and the election.

Particularly in light of these circumstances, the misconduct—including threats and bribery—by Adam Price requires setting aside the election. While it is true that "Congress granted the Board a wide discretion to ensure the free and fair choice of bargaining representative … [a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it." *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276-78 (1973) (quotation omitted). "The Act is wholly neutral when it comes to that basic choice." *Id.* Under Section 7 of the National Labor Relations Act (the "Act"), employees have the right not only to "form, join, or assist" unions, but also the right "to refrain from any or all of such activities." 29 U.S.C. § 157.

The Board's December 11, 2018 Order does not give adequate consideration to the right of employees Jennifer Miles and Joanna Durlin to resist the Union's organizing efforts. Therefore, it should be vacated and set aside in its entirety.

I. Price's Threat Requires Setting Aside the Election.

As Dollar General detailed in its brief, Price threatened to slash the tires of anyone who voted against the Union. Dollar General Br. at 6-7. Jennifer Miles explained that her vote in favor of the Union was "out of fear of retaliation" by Price. *Id.* Whether or not Price was an agent of the Union, this threat requires setting aside the election.

A. The Board cannot defend disregarding Price's threat based on the finding that the threat was made before the representation petition was filed.

The Board's principal response is that Price's threat is wholly irrelevant because it occurred 27 days before the election (and thus three days before the 24-day critical period). Neither logic nor law supports this position.

1. The Board erred in finding Price made the threat before the petition was filed.

The Board begins by defending the Hearing Officer's determination that the threat occurred outside the critical period. Board Br. at 15-18. But no evidence supports these findings. Instead, both the Hearing Officer and the Regional Director engaged in painstaking logical gymnastics to sidestep the significance of Price's misconduct.

The Board has no response to the critical point: no witness testified that Price made the threat before the petition was filed. Miles testified the threat was

made sometime between November 24 and December 1. Price denied making the threat, and testified only that he visited Miles' house on November 11.

If Miles is credited, then the threat occurred within the critical period. If Price is credited, then no threat was made. No witness testified that the threat was made outside the critical period—this finding was the invention of the Hearing Officer, and no evidence supports it. The Board could have chosen to credit Price's denial. Or it could have chosen to credit Miles' testimony that Price made the threat between November 24 and December 1. But it could not simply cobble together a new story that no witness supported to determine that the threat occurred outside the critical period.

The record does not support crediting Price over Miles. First, the Board does not have any serious response to the irrationality of discrediting Miles' testimony that Price threatened her. Miles voted in favor of the Union but immediately afterward was in tears and sought to change her vote. The Board suggests, for the first time, that Miles' reaction was a result of pressure from *the Company*, rather than the Union. See Board Br. at 25-26. Not only is that suggestion pure conjecture—as the Board acknowledges, there is no allegation of improper conduct by the Company—but also it is irrational. If Miles had acted on pressure from the Company, she would have voted *against* the Union.

Second, the Hearing Officer's determination to credit Price over Miles as to the date of the party is based on factual mistakes and inappropriate considerations. This Court is not required to accept the Hearing Officer's credibility findings simply because the Board labels them "demeanor-based." Rather, like any of the Board's factual findings, its credibility determinations must be supported by substantial evidence. *Carleton College v. NLRB*, 230 F.3d 1075, 1078 (8th Cir. 2000).

As Dollar General explained in its opening brief, the Hearing Officer was incorrect about the date of the party because of his factual mistake regarding the date the authorization cards were signed. The Hearing Officer credited Price's testimony that the party occurred on November 11 based primarily on the finding that the union authorization cards were signed on November 8. Dollar General Br. at 19-20. The Hearing Officer reasoned "it would make more sense that a party for 'card signers' would happen a few days after cards were signed." JA 123. But the Hearing Officer was incorrect: the cards were signed on November 13 – *after* the date Price claimed the party occurred. Dollar General Br. at 19.

The Board argues that this mistake was irrelevant because the Hearing Officer's "focus was the proximity of the party date to the card signing … even if he mistook the precise order of events." Board Br. at 19. This argument is inconsistent with the record and the timing of events in this case. The Hearing

Officer did not rely on the "proximity" of card-signing to the party; he relied on his finding that "a party for 'card signers' would happen a few days after cards were signed." JA 123.

The Board cannot rewrite the Hearing Officer's decision in this manner. *See NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965) (on review, "courts may not accept appellate counsel's post hoc rationalizations for agency action") (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *Paintsmiths, Inc. v. NLRB*, 620 F.2d 1326, 1334 (8th Cir. 1980) (a Board decision cannot be affirmed on the basis of a post hoc rationalization) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)).

The timing of the events in this case matters, especially because the Board discounted the evidence of Price's threat by finding it occurred outside the critical period. Because the Hearing Officer's decision to credit Price over Miles with respect to the date of the party was based on a factual mistake about the date the cards were signed, the Hearing Officer's credibility determination must be rejected. *See Carleton College*, 230 F.3d at 1080 (the Board "is permitted to draw reasonable inferences, and to choose between fairly conflicting views of the evidence," but "it cannot rely on suspicion, surmise, implications, or plainly incredible evidence") (quotation omitted).

No evidence supports the finding that the threat occurred outside the critical period. The Board manipulated the record to avoid addressing Price's threat and its impact on the election, and its finding should be rejected. *GSX Corp. v. NLRB*, 918 F.2d 1351, 1360 (8th Cir. 1990) (on review, this Court must "reject a conclusion of the Board that disregards or fails to give proper cognizance of uncontradicted or well-established facts").

2. Even if the threat was made before the petition was filed, the Board erred in disregarding the threat as irrelevant based on a mechanical application of *Ideal Electric*.

Alternatively, even crediting the finding that the threat occurred on November 11 (27 days before the election), the Board erred by treating the threat as wholly irrelevant because it occurred before the cards were signed.

a. This Court has jurisdiction to consider whether Price's threat affected the results of the election.

The Board contends that Dollar General did not sufficiently advance this issue for the Board's consideration and therefore this Court may not consider it pursuant to Section 10(e) of the Act. Board Br. at 26. The Board's argument is unavailing.

Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board … shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e).

At every step of the proceedings before the Board, Dollar General argued that Price's threat interfered with the election. *See* JA 137 (Objections to Election and Offer of Proof in Support); *id.* at 84-85 (Exceptions to the Hearing Officer's Report on Objections); *id.* at 94-95, 98-99, 102-104 (Brief in Support of Exceptions); *id.* at 20, 26, 30-33 (Request for Review of Regional Director's Decision and Certification of Representation); *id.* at 6 (Answer to Complaint); SA 1-2 (Response to Motion for Summary Judgment).

Dollar General argued to the Regional Director that the Hearing Officer failed to consider relevant evidence—Price's threat—warranting setting aside the election results, and raised the same challenge to the Regional Director's decision to the Board. The argument that Dollar General made below is precisely the same argument that it is making now—Price's conduct was so egregious that it warrants setting aside the election.

The cases cited by the Board in support of its argument are inapplicable. In *Woelke & Romero Framing, Inc. v. NLRB*, the Supreme Court found that the Court of Appeals was without jurisdiction to consider the Board's finding that unions do not violate Section 8(b)(4)(A) when they picket to obtain a subcontracting clause that is lawful under Section 8(e), where that issue had not been raised during the proceedings before the Board. 456 U.S. 645, 665-66 (1982). In *NLRB v. Cornerstone Builders, Inc.*, this Court adopted various findings

of an administrative law judge that had been affirmed by the Board without objection by the respondents. 963 F.2d 1075, 1077 (8th Cir. 1992).

Here, in contrast, Dollar General consistently argued that Price's threat was relevant to determining whether the election should be set aside. The Board had more than adequate notice of Dollar General's position, both before and after its decision issued. Section 10(e) does not foreclose the Court from considering the Company's argument.

b. *Ideal Electric* should not be applied to the circumstances of this case.

The finding that Price's threat occurred three days before the critical period does not justify treating the threat as irrelevant. When misconduct occurs before a representation petition is filed, the *Ideal Electric* rule may be used as a rule of thumb and convenience to exclude evidence of misconduct that occurred too remote in time to affect employees' exercise of free choice. But the Board's overriding duty is "insure the fair and free choice of bargaining representatives by employees." *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 276 (1973) (quotation omitted). The *Ideal Electric* rule cannot be "used to exclude important evidence needed to evaluate misconduct." *NLRB v. L & J Equipment Co.*, 745 F.2d 224, 237 (3d Cir. 1984).

The Board accepts the premise of Dollar General's argument: that the *Ideal Electric* rule cannot "flatly bar the consideration of all pre-petition misconduct."

NLRB v. R. Dakin & Co., 477 F.2d 492, 494 (9th Cir. 1973). But rather than providing an analysis of whether Price's threat would have persisted and affected the election under the circumstances of this case, the Board suggests that there are only discrete and narrow exceptions to the rule:

- "solicitation of … union authorization cards supporting an election petition using threats of job loss or unlawful promises of benefits";
- an employer's pre-decertification-petition bribe;
- misconduct occurring during the pendency of a petition subsequently withdrawn and replaced shortly after;
- supervisory misconduct; or
- egregious or repeated conduct or conduct recurring into the critical period.

Board Br. at 28-30. But mechanical application of these exceptions is as erroneous as mechanical application of *Ideal Electric* itself. The Board offers no rational reason to explain why Price's threats of violence against his fellow employees would be irrelevant merely because they occurred 72 hours before the critical period and only 27 days before the election. Even accepting the Hearing Officer's erroneous finding that the threat occurred before the petition was filed, the Board placed undue weight on that finding.

By November 11, "the start of intense campaigning" was already well underway, and the filing of the representation petition was imminent—the petition was filed on November 14. JA 157, 318. Even if Price made the threat on

November 11, it would have lingered in Miles' mind into the critical period. The threat was directly connected to the election, which was already a concrete event in the near future, rather than an abstract possibility. The credited testimony of Dollar General's Vice President of Human Resources, Kathleen Reardon, demonstrates that Price's threat remained on Miles' mind as of December 4, and affected her actions—Reardon testified that Miles approached her on December 4 and stated she had changed her mind about the Union but was concerned about revoking her authorization card because she feared retaliation from Price. JA 188-90. And Miles testified that the threat was still on her mind on the day of the vote and *did* affect her vote. JA 221.

Contrary to the Board's assertion, considering the effect of Price's threat in this case would not require the Board always to consider misconduct "no matter how distant" from an election. In some elections, conduct may well be too distant to affect the election. But under the unique circumstances of this case, Price's threat was inextricably linked with the election. Whether the November 11 party was "a coming together party for people that signed cards" (as the Hearing Officer found) or "a coming together of those employees who intended to sign cards" (as the Regional Director speculated), it was celebrating a significant step in the election process. See NLRB Casehandling Manual Part Two, §11022.1(a) (signed

authorization cards satisfy the required showing of interest in support of a representation petition).

The circumstances of this case are fairly unusual. In the typical case, card solicitation often takes several weeks, perhaps even months. Consequently, given that length of time, conduct occurring during the period of card solicitation is not always necessarily linked to the election. However, here, the card-signing and petition-filing happened in rapid succession and very close to the election. The cards were signed on November 13, and the election occurred 27 days later—less than one month. The Board's characterization of Price's threat as irrelevant, merely because it occurred three days before the petition was filed, was arbitrary and erroneous.

B. Regardless Whether Price Was an Agent or Third Party, His Threat of Violence Requires Setting Aside the Election.

As Dollar General set forth in its brief, whether Price's conduct is judged under the standard for conduct attributable to unions—reasonably tended to interfere with the employees' free and uncoerced choice—or the standard applicable to third parties—created an atmosphere of fear and reprisal such as to render a free expression of choice impossible—Price's threat to slash the tires of his coworkers requires setting aside the election.

1. Price Was an Agent of the Union.

Under general principles of agency law, which are applied liberally in the labor context, Price's misconduct is attributable to the Union.

First, the Board argues that Dollar General "relies primarily on actions taken by Price himself" rather than a "manifestation [of authority] by the Union." Board Br. at 35. Not so. Dollar General's brief detailed multiple examples of Myers conferring authority on Price. Among other things, Myers instructed Price to "talk to his coworkers and see if there's interest" in the Union, and distribute surveys soliciting employees' opinions about what they wanted in a collective-bargaining agreement. Dollar General Br. at 3, 5. Myers also relied on Price to "keep[] up with [fellow employee] Alan [Bloom]" to "mak[e] sure he's standing solid" and to keep Bloom updated about Union meetings because Bloom did not have a cellphone and Myers could not text with him. *Id.* at 5.

The Board is incorrect in arguing that agency requires that Price have "explicitly held himself out as a union agent or purported to speak on the Union's behalf." Board Br. at 38. Rather, in determining whether Price had apparent authority to speak on behalf of the Union, the relevant question is whether the other employees reasonably believed he was authorized to do so. *See Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 262 (8th Cir. 1993) (a manifestation of authority "may consist of direct statements to the third party *or the granting of*

permission to the other person to do something which reasonably leads the third party to believe that the person has the authority to perform those acts").

Myers knew that the other employees were aware that he was directing Price to engage in activity on behalf of the union (or approving of Price doing so) (*see* JA 320, 431-32, 440-41), but Myers never informed the other employees that Price was not the Union's agent or was not authorized to speak on the Union's behalf. Myers' conduct reasonably led the other employees to believe that Price was authorized to act and speak on behalf of the Union, and Myers knew or should have realized his conduct was likely to create such a belief. *See Millard Processing*, 2 F.3d at 262 (apparent authority is created where the principal intends to cause the third party to believe the agent is authorized to act for it, or "should realize that its conduct is likely to create such a belief"); *see also NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976) ("[I]n the eyes of other employees[,] [the employee organizers] were the representatives of the union on the scene and the union authorized them to occupy that position.").

Second, the Board attempts to distinguish cases cited in Dollar General's brief (in which unions were "largely absent" from organizing campaigns) by asserting that Myers visited the Auxvasse store "regularly" during the election campaign. Board Br. at 35, 38-40. The record does not bear this characterization. In fact, Myers visited the Auxvasse store even *less* frequently than the official

union representatives in *Kentucky Tennessee Clay* (official union representative visited three times before the representation petition was filed, three more times leading up to the week before the election, and checked into a motel room for the entire week before the election); *PPG Industries* (official union representative was at the front gate of the plant at least once a week prior to the election and daily during the last ten days of the campaign, and the union opened a temporary office at a local motel); and *Macomb Pottery* (official union representative visited four to five days a month in the five months preceding the election). *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436, 438-39 (4th Cir. 2002); *PPG Industries, Inc. v. NLRB*, 671 F.2d 817, 819-20 (4th Cir. 1982); *Local 340, International Brotherhood of Operative Potters (Macomb Potter Co.)*, 175 NLRB 756, 759 (1969).

Myers visited Auxvasse only three times during the 27-day campaign. The first time was on November 11, when he and Price solicited authorization cards from employees Price had recruited (and only from those employees). Myers then went on vacation for two weeks. After he returned, he visited Auxvasse again on November 28. Myers did not return to Auxvasse again until the date of the vote, December 8. Myers was not present in Auxvasse for the majority of the campaign period. His near-total physical absence from Auxvasse would reasonably have led

employees to believe that Price was authorized to speak and *act* on his and the Union's behalf in his absence.

One can understand why Myers and the Union would have chosen to conduct the campaign in this manner. The bargaining unit was small in size—only six individuals—and Myers was not located in Auxvasse. Becoming more fully involved in the campaign would have required additional time and resources from Myers that he may well have preferred to use elsewhere—perhaps on other organizing campaigns or bargaining units with more members. And in Auxvasse, Myers knew he had a dedicated Union supporter, Price, who would carry out the Union's organizing efforts in his absence. All of this is understandable, but the Union must now accept the consequences of choosing to conduct the campaign in this fashion. Having accepted the benefits of relying on Price to carry out the majority of the Union's in-person organizing efforts at the Auxvasse store, the Union should also be held accountable for Price's misconduct in connection with those efforts. *See PPG Industries, Inc. v. NLRB*, 671 F.2d 817, 821 (4th Cir. 1982) (in cases involving union campaigns, "we do not deal with hypertechnicalities of the law of agency, but rather with the real world …. The question is not so much one of 'agency,' in its purest sense as it is of whether the Union should be held accountable for the [employee organizers'] activities").

Accordingly, Price's misconduct should be attributed to the Union and judged by whether it reasonably tended to interfere with the employees' free and uncoerced choice. *Overnight Transp. Co. v. Highway, City and Air Freight Drivers, Dockmen, Marine Officers Ass'n, Dairy Workers, and Helpers Local Union No. 600*, 105 F.3d 1241, 1246 (8th Cir. 1997). As Dollar General explained in its brief, there is no question that a threat to slash the tires of anyone voting against the Union reasonably has this tendency. Dollar General Br. at 38-40. The Board has not responded to any of Dollar General's arguments on this point.

2. Even under the standard applied to misconduct by third parties, Price's threat requires setting aside the election.

Alternatively, even if Price was not an agent of the Union, the election must be set aside if his threat created an atmosphere of fear and reprisal that rendered Miles' free choice impossible. *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); *Westwood Horizons Hotel*, 270 NLRB 802, 802 (1984). Threats by third parties will interfere with a free election where they are "serious and likely to intimidate prospective voters to cast their ballots in a particular manner." *Westwood Hotel*, 270 NLRB at 803. For the reasons stated in Dollar General's brief, Price's threat to Miles met this standard (Dollar General Br. at 41-44), and the Board has not responded to this part of Dollar General's brief.

C. This Court can and should find Price made the threat and render judgment for Dollar General.

The Board does not dispute that Price's threat, if made during the critical period, would have required setting aside the election. Instead, the Board relies solely on *Ideal Electric* to discount the evidence of Price's threat entirely. The Board's wooden application of the *Ideal Electric* rule should be rejected for the reasons stated above. A threat to slash the tires of a co-worker is conduct that cannot be ignored when analyzing whether the results of an election were tainted.

Price's threat, if made, would have required setting aside the election. This is true whether Price was an agent of the Union (which, as explained above, he was) or whether he was a third party. As the Board acknowledges in its brief, at a minimum, this Court must remand for the Board to make a factual determination regarding whether Price threatened to slash the tires of employees voting against the Union. Board Br. at 32.

However, no remand should be necessary. For the reasons discussed above, the Board's theory—that Miles lied about being threatened because of pressure from *the Company*—is irrational. Further, for the reasons stated in Dollar General's brief, Price was not a credible witness. Dollar General Br. at 45. After discrediting Price's testimony, the only credited testimony remaining in the record is Miles' testimony that she was threatened by Price. This is corroborated by both

the credited testimony of Reardon, as well as Miles' written statement prepared the day after the election.

No further fact finding is necessary. Miles already testified regarding:

- what Price said: "if anybody decides to vote no, then, yes, he [Price] would slash their tires" (JA 220);
- the circumstances under which Price made the threat: at a "coming together of the people that had signed [authorization] cards" that Miles hosted at her home one to two weeks before the election (JA 219-20); and
- that Price was serious: Miles "fear[ed] that he may do – do that kind of damage to my property or somebody else's" (JA 220-21).

This Court can render judgment setting aside the election.

II. Price's Offer of Money for His Fellow Employee's Vote Requires Setting Aside the Election.

In addition to Price's threat to Miles, Price's offer of money to Joanna Durlin requires setting aside the election. It is undisputed that Price actually offered her money. The sole question is whether the offer requires setting aside the election. It did. Offering money for a vote—particularly to a single, working mother in need of funds and in a six-member bargaining unit—is repugnant to the purposes of the National Labor Relations Act and the Board's obligation to ensure a free and fair election.

A. The Hearing Officer's finding that Price offered to loan—rather than give—money to a fellow employee is based on factual errors.

The Hearing Officer erred by finding that the money Price offered to Durlin was a loan rather than a gift. Durlin testified that Price offered to give her $100 in exchange for her vote. JA 281, 292, 412. Price admitted offering $100 to Durlin, but testified that the offer was a loan. JA 335. As Dollar General explained in its brief, the Hearing Officer erroneously believed the Price's "loan" testimony was corroborated by Miles. Dollar General Br. at 47- 49; *see also* JA 262 (Miles testifying that the offer was a gift of money).

The Board apparently concedes that the Hearing Officer made a factual error in finding that Miles corroborated Price. However, in its brief the Board goes to great lengths to discount the error. According to the Board, the error is "irrelevant" because the "key, corroborated factual finding is that, whichever it was [a gift or a loan], it was unconditional." Board Br. at 44.

The Board is incorrect—it is highly relevant that Miles' testimony did not corroborate Price's. An offer to buy an employee's vote requires setting aside an election. *Revco D.S., Inc. v. NLRB,* 830 F.2d 70, 73 (6th Cir. 1987) ("It is difficult to imagine an act more likely to contaminate an election than an offer to buy votes."). Durlin testified Price did exactly that and Miles corroborated her. In the underlying proceedings, the Board failed to address, much less explain, the Hearing Officer's error. The Board cannot now dismiss the factual error as

"irrelevant" or tiptoe around it by re-characterizing the Hearing Officer's conclusion as a finding that the offer was "unconditional." *See Burlington Truck Lines*, 371 U.S. at 168-69 (an agency's order cannot be upheld on a basis not articulated in the order by the agency itself); *Metropolitan Life Ins.*, 380 U.S. at 444.

B. Price's offer to give money to a fellow employee for her vote requires setting aside the election.

A pre-election payment made to influence prospective voters is grounds for setting aside the election. *NLRB v. Commercial Letter, Inc.*, 455 F.2d 109, 111 (8th Cir. 1972). Because Price's offer of money to Durlin—whether characterized as a gift or a loan—was a pre-election payment made in exchange for her vote, the election must be set aside.

In defending the refusal to invalidate the election, the Board relies on the incorrect legal standard. First, the Board argues that Dollar General was required to show that Price's offer of $100 to Durlin created "a general atmosphere of fear and reprisal rendering a free election impossible." Board Br. at 42. But this is the standard that applies when evaluating whether to overturn the results of an election based on conduct such as threats or violence by a third party.

When the misconduct at issue involves a promise or offer of benefits, the question is whether what is offered is "sufficiently valuable and desirable in the eyes of the person to whom [it is] offered, to have the potential to influence that

person's vote. *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 583 (6th Cir. 1995). This is the standard that applies regardless of whether the bribe was offered by the Union, an agent of the Union, or a third party.

It is illogical to ask whether a *benefit* created an atmosphere of fear and reprisal. That is because "it is difficult to imagine an act more likely to contaminate an election than an offer to buy votes." *Revco D.S., Inc. v. NLRB*, 830 F.2d 70, 73 (6th Cir. 1987). Under the correct standard—potential to influence another's vote—Price's offer of money to Durlin requires setting aside the election.

Second, the Board suggests that an offer of benefit is only objectionable if the employee to whom it is offered was not a union supporter. *See* Board Br. at 43 ("there is no evidence Durlin … had wavered in her union support. Accordingly, Price had no reason to offer her money to secure her vote"). Well-established case law holds precisely the opposite. An offer of benefit made to a union supporter as a reward or to ensure the supporter's continued support is objectionable as well. *See, e.g.*, *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277-78 (1973) (waiver of union initiation fees offered to employees who signed union "recognition slips" as a show of preelection support interfered with employees' free and fair choice); *Collins & Aikman Corp. v. NLRB*, 383 F.2d 722, 729-30 (4th Cir. 1967) (setting aside election based on union's excessive cash payments to its own election

observer); *NLRB v. Shrader's, Inc.*, 928 F.2d 194, 196 (6th Cir. 1991) (invalidating election where union offered hats and T-shirts to employees either as a "bribe or reward for voting for the union"); *Plastic Masters, Inc. v. NLRB*, 512 F.2d 449, 450 (6th Cir. 1975) (refusing to enforce bargaining order where union paid excessive reimbursements to employees for their expenses and wages lost in spending time helping the union).

Third, the Board suggests that an offer must be contingent on the employee's union support or vote. *See* Board Br. at 43-44 ("Neither Price nor Miles stated that he told *Durlin* that her union support motivated him in any way, much less made the offer contingent on Durlin's union support or vote"); *id.* at 44 ("the key, corroborated factual finding is that, whatever it was, it was unconditional"). Again, this is contrary to the well-established case law. *See, e.g.*, *Comcast Cablevision-Taylor v. NLRB*, 232 F.3d 490, 497-98 (6th Cir. 2000) (even benefits that are not contingent on an employee's support for the union are objectionable because they impose an implicit "constraint to vote for the donor union"); *NLRB v. River City Elevator Co.*, 289 F.3d 1029, 1033-34 (7th Cir. 2002) (union's gift to employees was objectionable, even though it was not conditioned upon employees' support for the union).

Nor was it necessary for Price to have explicitly told Durlin that he was offering her the money so that she would vote for the Union. *See NLRB v. Polyflex*

M Co., 622 F.2d 128, 130 (5th Cir. 1980) (the question of whether an ambiguous offer or promise is objectionable depends on the "objective interpretation a reasonable employee would derive" from the offer); *King Elec., Inc. v. NLRB*, 440 F.3d 471, 474 (D.C. Cir. 2006) (a benefit cannot be made contingent on employees' staying to vote on election day). The Board even acknowledges that in connection with the offer of $100, Price explained that he did not want Durlin to quit, because he assumed she was planning to vote for the Union. Board Br. at 43. The easy inference is that Price was offering Durlin money to ensure she was present for the vote to vote "yes." That was the clear message the offer conveyed, and Durlin testified that she believed Price made the offer to ensure she voted yes. JA 291.

For these reasons, the Board's attempt to explain away the Hearing Officer's mistaken conclusion that Price's testimony was corroborated by Miles—that the "key" factual finding is that the offer was unconditional—fails. Regardless of whether Price offered Durlin $100 as a gift or a loan, and regardless of whether he expressly conditioned the offer on Durlin's union support, the offer had a reasonable tendency to influence the election.

III. The Totality of the Circumstances Requires Setting Aside the Election

Contrary to the Board's position, Price's threat to slash the tires of any employee who voted against the Union, and his offer of $100 to Durlin warrant

setting aside the election – either by themselves, or viewed cumulatively. This is particularly true, given the small size of the unit and the closeness of the vote.

"The course of conduct during an election campaign must be evaluated in light of the closeness of the outcome." *NLRB v. Van Gorp Corp.*, 615 F.2d 759, 766 (8th Cir. 1980). Further, close elections require heightened scrutiny. *Monmouth Med. Ctr. v. NLRB*, 604 F.2d 820, 823 n. 4 (3d Cir. 1979) (closer cases—in which one or two votes could have changed the results—merit "closer scrutiny"); *Robert Orr-Sysco Food Servs.*, 338 NLRB 614, 615 (2002) (hearing officer "did not sufficiently take into consideration the closeness of the election results").

Here, a *single* vote would have changed the outcome of the election, and it is uncontroverted that Price engaged in objectionable behavior that impacted the vote. The Board should not be permitted to hide behind the cloak of a woodenly applied precedent whereby a mere three days separates an unlawful threat and a promise of monetary gain to ensure a victory for any party.

CONCLUSION

For the foregoing reasons, and for those set forth in Dollar General's principal brief, Dollar General respectfully requests that the Court grant its Petition for Review and deny the Board's Cross-Petition for Enforcement.

Dated: May 16, 2019

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ Lauren M. Emery*
Joseph C. Ragaglia
Michael E. Lignowski
Crystal S. Carey
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5365 / (215) 963-5455

Lauren M. Emery
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-5203
Admitted in Illinois only; Practice supervised by DC Bar members

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,692 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point font.

3. In accordance with Circuit Rule 28A(h)(2), I certify that this brief has been scanned for viruses and is virus-free.

/s/ Lauren M. Emery

Joseph C. Ragaglia
Michael E. Lignowski
Crystal S. Carey
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5365 / (215) 963-5455

Lauren M. Emery
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-5203
Admitted in Illinois only; Practice supervised by DC Bar members

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2019, I electronically filed this **Reply Brief of Petitioner/Cross-Respondent Dolgencorp, LLC** with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Lauren M. Emery
Joseph C. Ragaglia
Michael E. Lignowski
Crystal S. Carey
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5365 / (215) 963-5455

Lauren M. Emery
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-5203
Admitted in Illinois only; Practice supervised by DC Bar members

Counsel for Petitioner/Cross Respondent Dolgencorp, LLC

Dated: May 16, 2019